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The Chaoulli Judgment or How to Sell Off a Public Right

The problem is to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before. This is the fundamental problem of which the Social Contract provides the solution.

JEAN-JACQUES ROUSSEAU, The Social Contract

What was now wanted was, that the rulers should be identified with the people.... The nation did not need to be protected against its own will... But...the notion, that the people have no need to limit their power over themselves, might seem axiomatic, when popular government was a thing only dreamed about... Protection, therefore, against the tyranny of the magistrate is not enough... How to make the fitting adjustment between individual independence and social control – is a subject on which nearly everything remains to be done... What these rules should be, is the principal question in human affairs.

JOHN STUART MILL, On Liberty

On the surface, the positions of Flood and Lewis and Evans on the Chaoulli judgment, expounded in their articles for this issue of *Healthcare Policy/Politiques de santé*, are quite similar. Although Evans's style is rather flamboyant, and while Flood and Lewis's is more staid, all three agree in their condemnation of the Supreme Court's judgment. The Chaoulli judgment is factually and logically flawed, and the legal arena is not set up to hold an essentially political debate. The two texts also complement one another. Flood and Lewis analyze the majority judgment and criticise the use it makes of social sciences and the opinion of a few physicians who testified before the Court. Their analysis reflects many commentaries that have been published in the press (Béland 2005) and on Canadian Internet sites (Longwoods eLetter 2005). They suggest some actions and steps to take to limit the consequences of the Chaoulli judgment on Canada's public and universal medicare system. Evans relates the history of federal and provincial budgets and of medicare

funding since the 1970s and notes the missed opportunities to extend medicare coverage beyond strictly medical or hospital services.

The authors then disagree on what will follow. Flood and Lewis get lost in conjecture about ways to limit the damage. Do they avoid mentioning the notwithstanding clause as a matter of principle or realism? Evans certainly suggests its use without qualms. As a matter of fact, the current Liberal government of Quebec refused to use the notwithstanding clause. [Remember the other Liberal government of Quebec that invoked the use of the notwithstanding clause after a few sections of a language law were struck down by the Supreme Court? A few provincial premiers, mesmerized Trudeau followers (him again!) definitely demonized the notwithstanding clause and found one more reason to sink the Meech Lake Accord.]

The entire country got so caught up in the extremes of the Liberal logic on the Charter of Rights issue that any recourse to the notwithstanding clause is anathema. Any one statement made by the Supreme Court judges since the adoption of the Quebec and Canadian Charters automatically becomes enshrined, even when the judges are wrong. The debate, which must be ongoing, on the balance between individual freedom and social control is emasculated from that moment on.

And this time, the judges in the majority were wrong. The question is this: did Mr. Zeliotis, the man for whom all of this happened, suffer from the tyranny of the majority by not being able to buy private insurance? The Quebec courts and the Supreme Court minority judges observed that Mr. Zeliotis did not have cause of action. In his specific case, it was established that the delay in obtaining care was a result of his physical and psychological state and delays which he himself caused. The majority judges also abstained from asking themselves if Mr. Zeliotis would have access to private insurance since he inquired about private insurance after his medical diagnosis, not before.

The Court weighed Mr. Zeliotis's right to use private insurance against the consequences of waiting times in the public system on his health and safety (Chaoulli v. Québec, 2005). Yet, Mr. Zeliotis's right to obtain healthcare is a right created by the presence of a public and universal medicare system. This right would simply not exist if healthcare insurance were still available only through private carriers on a private market in Canada. As a result, the Supreme Court recognized Mr. Zeliotis's right, as well as the right of all Quebecers, to buy private coverage since he could not obtain the required healthcare fast enough under the public system, even though this universal right simply does not exist in a private insurance system, a system which the Supreme Court promotes! Therefore, Mr. Zeliotis did not suffer from the majority's tyranny. On the contrary, the existence of a collective right, that is, universal and public coverage of medical and hospital services, is the only guarantee that exists to ensure that an individual right can be exercised, that is, reasonable access to those services. Here, the social contract offers all the necessary protection against the will of a few who want

to corrupt it for their benefit. A little more Jean-Jacques Rousseau, a little less John Stuart Mill, would do. Conclusion: this is a case of the tyranny of judges, the judges of the Supreme Court. The Quebec government is fully justified to use the notwithstanding clause.

Judges are magistrates, and whatever is said about the separation of powers theory, judges are appointed through politics and are part of the machinery that governs us. It is therefore just as necessary to protect the nation from judges' tyranny as it is to protect the nation from politicians. In the case of Chaoulli, the majority judgment is bad enough that the balance of power, that never resolved issue, demands that the "political magistrates" (Parliament) protect the nation against the excesses of the "legal magistrates." May the echoes of Evans's appeal be heard, the judges's enshrinement reviewed and the curse on the notwithstanding clause lifted.

Stoic before the legal-political enshrinement of the Charters, Flood and Lewis can only make suggestions, a few of which cannot but surprise me. I will mention only one. The authors insist that Ottawa impose a waiting-list management system on the provinces. I can picture all my good friends from English Canada nodding in agreement. How ironic! The ineptitudes of a federal governmental machine, the Supreme Court, would be corrected by enhancing the powers of another federal machine, that is, the political one. However, Quebec carried out its duty by banning private insurance systems, and the Quebec courts rejected the claims of Chaoulli and Zeliotis. Furthermore, Quebec recently implemented measures to manage citizens's complaints effectively. Will Flood and Lewis suggest every time a federal body blunders that another federal body take over a provincial jurisdiction? I do not understand this widespread obsession with enhancing federal power in healthcare. Does Australia, which also has a federal government with vast powers in healthcare, have such an exemplary history in healthcare policy that a centralizing federalism appears so clearly superior to the more decentralized Canadian system? Yet, the decentralized division of power in Canada prevents any federal government from wiping out every provincial medicare program with a stroke of a pen as the Australian right-wing has systematically done for over a quarter-century.

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Flood and Lewis' s long-term suggestions make more sense. Without going through them one at a time, let me point out that they stress that the public and universal medicare system must adapt to the changing healthcare needs of the population

and to the advancement in health and technology sciences. Canadians have shown increasing dissatisfaction with the system over the last few years. It would be fair to speculate that the majority judgment of the Supreme Court is a populist but genuine reflection of that disgust. Support for public and universal medicare can quickly dwindle. Evans also points out that the system is costly for the rich, who are healthier than others. The data from Mustard et al. (1998) also show that, as of the fifth income decile, tax dollars paid into the healthcare system are equal to or less than the benefits taxpayers reap from healthcare. It wouldn't take much to tip the scales and lose their support: too little public expenditure over too many years, or the erosion of the Canadian idea that a good government is founded on the logic of social contract rather than on the maximization of individual happiness, or an election, out of despair, of a Conservative federal government, or a few more years of a Martin-Stronach government, or some scandals and negligence here and there. We are fooling ourselves if we think that these events are unlikely. Rather than constantly bringing up medicare and the Canadian identity over and over again like some kind of incantation every time the medicare system gets hit, it would be wiser, in the interest of defending it, to invest in the system itself.

REFERENCES

Béland, F. (2005). La Cour suprême du Canada a raté une belle occasion de se taire. *Le Devoir*, 29 June.

Chaoulli v. Québec, Supreme Court of Canada, 2005, SCC 35, Para. 27, 29, 34, 35, 37 to 43.

Longwoods eLetter (2005) *Commentaries on The Supreme Court Decision: Chaoulli v. Quebec* <http://www.longwoods.com/products.php?producted=17345&page=1>

Mustard, C.A., Barer, M.L., Evans, R.G., Horne, J., Mayer, T. and Derksen, S. (1998). Paying taxes and using healthcare services. The distributional consequences of tax financed universal health insurance in a Canadian province, Study presented at the Centre for the Study of Living Standards Conference, "The State of Living Standards and the Quality of Life in Canada." Ottawa, 20-31 October, [htpp://www.csls.ca/oct/must1.pdf]

Rousseau, J.J. (1966[1763]). *The Social Contract.* Paris: Garnier-Flammarion

Mill, J.S. (1990[1859]). *On Liberty*. Paris: Gallimard